LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 2 1974
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT of the UNITED STATES

October Term, 1973

No. 73-886

BROWNDALE INTERNATIONAL LIMITED, A Canadian Corporation,

Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

LLOYD A. SCHNEIDER
Counsel for Respondent,
Town of Cottage Grove

LLOYD A. SCHNEIDER
5906 Main Street
McFarland, Wisconsin 53558

The Gilman Press, Inc., Madison, Wisconsin 53703

INDEX

PAGE

BASIS FOR OBJECTING TO GRANTING WRIT OF CERTIORARI 2

RESPONSE TO PETITION 2

QUESTION PRESENTED 3

ADDITIONAL STATUTES AND ORDINANCES INVOLVED 4-9

STATEMENT OF THE CASE 9-12

WHAT IS A BROWNDALE HOME? 9-11

TYPE OF CHILDREN INVOLVED 11-12

BASIS FOR OBJECTING TO GRANTING WRIT OF CERTIORARI 12-18

1. DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND JUDGMENT RESTS ON ADEQUATE NON-FEDERAL BASIS 12-17

2. JUDICIAL QUESTION IS NOW MOOT 17-18

CONCLUSION 19

CITATIONS

CASES:

PAGE

Boraas v. Village of Belle Terre, 476 F. 2d 806 (2nd Cir. 1973) *U. S. Appeal Docketed*, No. 191, 42 U.S.L.W. 3109

probable jurisdiction noted, 42 U.S.L.W. 3226 ..... 14, 15

Euclid v. Ambler Realty Co., 272 U. S. 365 (1926) 17

CONSTITUTIONAL PROVISIONS:

Due Process Clause, U. S. Const., Amend. XIV, Sec. 1 14

Equal Protection Clause, U. S. Const., Amend. XIV, Sec. 1 13-14

FEDERAL STATUTES:

Federal Civil Rights Act of 1971, 42 U.S.C., Sec. 19.83 14

WISCONSIN STATUTES (1971):

Chap. 48 16

Sec. 70.11 4

70.11 (19) 4, 10

48.60 ..... 4-5, 5

48.62 ..... 5, 6

PAGE

Wisconsin Rules for Licensing Child Welfare Institutions 5

Wisconsin Rules for Licensing Foster Homes 5

DANE COUNTY ORDINANCES (1971):

Sec. 10.12 (2) 4

10.12 (2) (c) 15

10.25 (4) 4, 15

10.26 (3) (a) (3) 16

DANE COUNTY ORDINANCES (1972):

Sec. 10.12 A-1 ..... 6, 15

10.12 (2) 6

10.25 6

10.25 (7) (a) and (g) 7-8

DANE COUNTY ORDINANCES (1973):

Sec. 10.01 (23a) 9

10.12 (2) (q) 7

TEXTS CITED:

Anderson, American Law of Zoning 13

In The

SUPREME COURT of the UNITED STATES

October Term, 1973

No. 73-886

BROWNDALE INTERNATIONAL LIMITED, A Canadian Corporation,

Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The Respondent, Town of Cottage Grove, respectfully prays that the petition of the Petitioner, Browndale International Limited, for the issue of a Writ of Certiorari to review the judgment and opinion of the Wisconsin Supreme Court entered in this proceeding on June 18, 1973, be dismissed.

BASIS FOR OBJECTING TO GRANTING WRIT OF CERTIORARI

1. That the appeal from the Wisconsin Supreme Court presented to the Court does not present a substantial Federal question, and the judgment of the Wisconsin Supreme Court rests on an adequate non-federal basis.

2. The appeal presented to the Court is now moot, as a result of the amending of the Dane County Ordinance, by the Dane County Board. The validity of this new ordinance has not been presented to or expressly passed upon by the Wisconsin Supreme Court.

RESPONSE TO PETITION

The petition for a Writ of Certiorari was served by mail upon the attorney for the Respondent, Town of Cottage Grove, on December 7, 1973, and this response in opposition to the granting of said writ was filed within 30 days of that date in compliance with 28 U. S. C., Supreme Court Rules, Rule 16 (1).

References to "R. ....." are to the certified record. References to "App. ....." are to the Appendix of Appellant's petition. Reference to "Ex. ....." are to exhibits filed with the Circuit Court, which are a part of the record in the Court below and in this Court. References to "I Ap. ....." are to the Appendix of the Intervenor-Appellant filed with the Court below and a part of the record of that Court and in this Court. Aeferences to "P. Br. ....." are to the page of petitioner's brief in this Court.

QUESTION PRESENTED

This is solely a zoning question. Pursuant to the police powers delegated to the County of Dane by the State of Wisconsin, is it constitutional for the Dane County Board of Adjustment to interpret the ordinance in such a manner as to distinguish between a corporation operated for profit and licensed as an institution for the treatment of emotionally disturbed children from a single family dwelling, thereby requiring the corporation to attain approval of site after a public hearing?

ADDITIONAL STATUTES AND ORDINANCES INVOLVED

The statutes and Dane County Ordinances involved in addition to the constitutional provisions, statutes and ordinances cited in Petitioner's petition are: Sec. 70.11 (19), Wis. Stats.; Sec. 48.60, Wis. Stats., 48.62, Wis. Stats.; and Sec. 10.12 (2) (Repealed and recreated); Sec. 10.12 (2) (q), (Created); Sec. 10.25 (4) (Repealed and recreated as Sec. 10.25 (7)) and Sec. 10.01 (23a) (Created), Dane County Ordinance, as amended effective September 7, 1972 and October 16, 1973.

SECTION 70.11 (19), WIS. STATS. (1971)

70.11 Property Exempted from Taxation. The property described in this section is exempted from general property taxes:

(19) INSTITUTIONS FOR DEPENDENT CHILDREN, ETC. All the real and personal property of any children's institution licensed for the care of dependent, neglected or delinquent children under s. 48.60 while the same is actually used for such purpose and all real and personal property of any institution for mentally deficient children described in s. 48.60 (2) (f) while the same is actually used, not for profit, for the care of mentally deficient children.

SECTION 48.60, WIS. STATS., (1971)

48.60 Child Welfare Agencies licensed. (1) No person shall receive children with or without transfer of legal custody, to provide care and maintenance for 75 days in any consecutive 12 month period for 4 or more such children at any one time unless he obtains a li-

cense to operate a child welfare agency from the department.

(WISCONSIN) RULES FOR LICENSING CHILD WELFARE INSTITUTIONS. (R. unnumbered)

PW-CY-40.50 (e) definitions

6. Child Welfare Agency	Any facility required to be licensed under Section 48.60, Wis. Stats.
7. Child Welfare Institution	A child welfare agency which regularly provides care and maintenance for children within the confines of its building.

PW-CY-40.51 (1) INCORPORATION

Every child welfare agency shall be incorporated. Any agency incorporated outside of Wisconsin shall secure authorization from the Secretary of State to do business in Wisconsin.

SECTION 48.62 WIS. STATS. (1971)

48.62 Foster Homes Licensed. (1) No person shall receive with or without transfer of legal custody, any child to provide care and maintenance for that child unless he obtains a license to operate a foster home from the department or from a county agency as provided in s. 48.75.

(WISCONSIN) RULES FOR LICENSING FOSTER HOMES (R. unnumbered)

PW-CY-40.50 (1) (d) DEFITIONS

4. Foster home	Any facility operated by a person required to be licensed under Section 48.62, Wis. Stats.

PW-CY-40.61 (2) (a) AGE OF FOSTER PARENTS.

No applicant or applicants may receive a license for the first time when one or both are younger than 21 or older than 64 years.

PW-CY-40.61 (4) (a) HEALTH OF FOSTER FAMILY.

All members of the foster family household must be in physical and mental health that will not adversely affect the health of children received for care, or the quality and manner of their care.

PW-CY-40.63 (1) (b)

The foster mother shall not be regularly employed outside the home without written approval of the licensing agency. . . .

DANE COUNTY ORDINANCES REPEALED, AMENDED OR CREATED

SECTION 10.12 A-1 AGRICULTURAL DISTRICT, DANE COUNTY ORDINANCE (1972) ADOPTED AND EFFECTIVE SEPTEMBER 7, 1972.

(2) CONDITIONAL USE IN A-1 AGRICULTURAL DISTRICT.[1]

---

[1]The above ordinance repeals old Section 10.12 (2), which was stated as follows: "PERMITTED USES WHICH ARE SUBJECT TO PROVISIONS OF 10.25 (4) APPLICATION FOR APPROVAL OF SITE."

SECTION 10.12 (2) (q), DANE COUNTY ORDINANCE, (1973) created and adopted August 23, 1973, effective October 16, 1973, is created to read as follows:

SECTION 10.12 (1) (a), DANE COUNTY ORDINANCE (1973).

SECTION 10.12 A-1 AGRICULTURAL DISTRICT

(1) PERMITTED USES

(a) SINGLE FAMILY DETACHED DWELLING UNITS

. . .

(2) CONDITIONAL USES PERMITTED IN THE A-1 AGRICULTURAL DISTRICT

. . .

(q) Institutions for children.

SECTION 10.25 ADMINISTRATION, ENFORCEMENT AND PENALTIES.

. . .

(7) CONDITIONAL USES

(a) Statement of purpose:

The development and execution of this ordinance is based upon the division of the County into districts, within which districts the use of land and buildings, and bulk and location of buildings and structures in relation to the land are mutually compatible, and substantially uniform. However, there are certain uses which, because of their unique characteristics, cannot be properly classified as unrestricted permitted uses in any particularly district or districts, without consideration, in each case, of the impact of those uses upon neighboring land or public facilities, and of the public need for the particular use at a particular lo-

cation. Such uses, nevertheless, may be necessary or desirable to be allowed in a particular district provided that due consideration is given to location, development, and operation of such uses. Such uses are classified as conditional uses and are uses entirely private in character, but of such an unusual nature that their operation may give rise to unique problems with respect to their impact upon neighboring property or public facilities.

. . .

(g) Standards:

1. That the establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare.

2. That the uses, values and enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by the establishment, maintenance or operation of the conditional use.

3. That the establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.

4. That adequate utilities, access roads, drainage and other necessary site improvements have been or are being provided.

5. That adequate measures have been or will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public street, and

6. That the conditional use shall conform to all applicable regulations of the district in which it is located.

10.01 Definitions:

. . .

(23a) Institutions for children: An institution for the care of children are licensed and authorized by the Wisconsin Department of Health and Social Services under Chapter 48, Wisconsin Statutes.

. . .

STATEMENT OF THE CASE

WHAT IS A BROWNDALE HOME?

The purpose of a Browndale home is for treatment of emotionally disturbed children, on a commercial basis by a private corporation organized for profit. (R. 198, 281; I Ap. 129, 131)

Browndale International Limited owns or leases the premises that are the abode and treatment center for the emotionally disturbed children. It leases or subleases these premises to a subsidary corporation known as Involvement Centers, Wisconsin, Inc., (hereinafter "Involvement Centers") on a net rental basis of between $400.00 and $1,000.00 per month. (R. 187, 206; I Ap. 129, 130)

Involvement Centers are licensed by the Wisconsin Department of Health and Social Services (hereinafter "Department") as a child welfare agency. (Ex. 1; R. 64-65; I Ap. 111-113) A child welfare agency which regularly provides care and maintenance for children within

the confines of its building is defined by the Department as a Child Welfare Institution.[2]

All buildings used as a child welfare institution in Wisconsin must be inspected and approved by the Industrial Commission of Wisconsin before they can be used as an institution. (R. 209; I Ap. 120) Single family residential homes and foster homes in Wisconsin do not have to be approved by the Wisconsin Industrial Commission.

Browndale Homes are exempt from property tax.[3] Foster homes and single family residences are not so exempt.

Involvement Centers submitted a budget to the State of Wisconsin for the year 1972 in the amount of $1,528,-655.00, which the Bureau of Budget by a desk audit dated January 22, 1972, reduced to $1,186,686.00 as a cost basis of profit and allowed a profit of 8% thereon in the amount of $94,931.00. (Ex. 6; R. 71-74, p. 74; I Ap. 117-122, p. 122)

Browndale had preliminary plans to operate 21 houses on the lands it offered to purchase in the Town of Cottage Grove (hereinafter "Town") but later the plans were changed to complete only 6 homes. (R. 101; I Ap. 105) Browndale offered to purchase 3 homes on platted lots from one Moe for $101,650.00 (R. 75; I Ap. 122-124) and two farms comprising 182 acres, more or less, from one Miller for $193,000.00. (R. 76; I Ap. 125-127) The two farms are contiguous to each other in the Town of Cottage Grove.

---

[2]Rules for Licensing Child Welfare Institutions. PW-CY 40.50 (1) (e) (7).

[3]Section 70.11 (19), Wis. Stats. (1971)

The Department in licensing homes for Involvement Centers is concerned over the community's receptivity to additional children being placed in one area in the town. (Ex. 3; R. 67-68; I Ap. 114-116 and Ex. 5; R. 69; I Ap. 116-117) The people of Cottage Grove were found to have no objection to the one Browndale Home that was licensed there. (R. 360)

TYPE OF CHILDREN INVOLVED

Emotionally disturbed children present a behavior problem to the area in which they are institutionalized. (R. 131, 134, 226, 244; I Ap. 129, 130) They are deviant for saneness. (R. 137; I Ap. 129) They require intensive care (R. 251-253; I Ap. 130) and many of them have had difficulty with the law (R. 208; I Ap. 130) and "two people get worn out by these kinds of kids" (R. 144; I Ap. 129) and "normally you run 20 or 25 children per social worker." (R. 145; I Ap. 129) They need medical attention from a psychiatrist and other medical specialists (R. 146; I Ap. 129) and for some "it takes a period of time before they become civilized" (R. 163; I Ap. 129) and they come to Browndale because they are children that no other institution would accept. (R. 168, 244; I Ap. 129, 130) They are children who have presented problems elsewhere and so bring these problems to the institution. (R. 134; I Ap. 129) When referring to their therapeutic parents, they may refer to them by unmentionable profanities. (R. 154; I Ap. 129)

Browndale children are received under guardianship of the state or courts (R. 225; I Ap. 130) and are placed

involuntarily with Browndale. They may consist of the 1% most disturbed in the state (R. 218; I Ap. 130) and require strict supervision and extended care (R. 251, 253; I Ap. 130) and are most difficult children. (R. 226; I Ap. 130)

BASIS FOR OBJECTING TO GRANTING WRIT OF CERTORARI

1. DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND JUDGMENT RESTS ON ADEQUATE NON-FEDERAL BASIS.

The people in the Town did not and do not object to the one Browndale home being licensed in the Town. They realize the duty of every community to accept its fair share of unfortunate children for rehabilitation. The people and the town board were concerned about the operation of 21 Browndale homes in one area. They felt they would present a behavior problem to adjacent residences and land owners. The Town would be presented with a police protection problem. The local schools could also be imposed upon to cope with scores of emotionally disturbed children.

The proposal of Browndale to construct and operate 21 homes in one area in the Town not only presented many problems to the Town, school system and adjacent residences and landowners, but defeated the purpose of the program established for the best interests of the children. Instead of dispersing the children among normal family residential groups during their treatment period, it was taking them from a one-building institution and placing them in an institutional-motel sytem. One community

should not be expected to accept hundreds of these children. The necessity of zoning to protect the children and the community is apparent.

Anderson, American Law of Zoning, Section 9.15, p. 140, states:

> "*Property owners in some residential neighborhoods react more strongly to a proposed use of nearby land by institutions, public or private, for the education and care of delinquent or retarded children,* than to a projected use of the same land for the education of presumably normal children. *Institutions of the former kind are believed to pose a greater threat to the character of a residential neighborhood, and to its* property values." (Emphasis ours)

and at Section 9.39, p. 193 states:

> "The nonprofit uses also include hospitals, convalescent homes, sanitariums and shelters established to meet particular needs. . . . All of these nonprofit uses supply a community need, but all of them generate traffic and produce noise and activity which may disturb the peace of a residential neighborhood and reduce the value of land in a residential district." . . . "*Since these uses are not always compatible with residential neighborhoods the problem is one of accommodating a desirable use to the circumstances of a site where it does not automatically blend with its surroundings.*" (Emphasis ours)

Therefore, it was reasonable for the Board of Adjustment to interpret the ordinance requiring approval of site after a public hearing in order to determine the affect a Browndale home would have on the adjacent residents and property values. The Equal Protection Clause of the

Constitution should not be used as a basis of taking property without due process, such as the probable reduction of property values, without the necessity of a public hearing for approval of site. State police powers take into consideration the rights of individuals to enjoy their home without probable disturbance from the conduct of large concentrations of emotionally disturbed children.

This case presents a zoning question only. No race, sex or minority group discrimination is involved. It is purely a question of a unit of government, pursuant to its police powers, determining the best manner in which it can rehabilitate emotionally disturbed children with the least possible adverse effect upon the property rights and individual rights of others.

In *Boraas v. Village of Belle Terre*, 476 F. 2d 806 (2d Cir. 1973) U. S. Appeal Docketed, No. 191, 42 U. S. L. W. 3 (09), six unrelated, unmarried, healthy people lived together in one house and were racially discriminated against by being denied (on the basis of being illegal residents) residents' beach passes. The action in *Boraas* was commenced under the Federal Civil Rights Act of 1871, 42 U. S. C. Sec. 1983, not as a zoning action.

The interpretation of the ordinance by the Board of Adjustment for Dane County had nothing to do with compelling persons who take up residence in the community to conform to the community's prevailing ideas of life style. (3 unmarried couples of opposite sex). *Boraas* overruled the Village of Belle Terre because the Village's decision had no relevance to public health, safety or welfare or to the theory that it had a national basis of traditionaly recognized zoning objectives. This has no simile

with a Browndale home. The children in Browndale homes are being medically treated for rehabilitation, which is their primary purpose of being institutionalized. They are not in the home for the primary purpose of living.

The State of Wisconsin has licensed Involvement Centers as a child welfare agency, which is defined by the Department to be a Child Welfare Institution. Section 10.12 A-1 (2) (c), Dane County Ordinance (P. Br. 6) is a logical interpretation in which to classify an institution for children, requiring approval of site under Sec. 10.25 (4), Dane County Ordinance. There is nothing "suspect" about this classification as defined in *Boraas* and is "compelling" and "necesary" to achieve the purpose of the zoning ordinance and make it workable.

Petitioner stated that the Board of Adjustment's interpretation is a dangerous Constitutional precedent that bars emotionally disturbed children from being in residential areas. This is not true. The interpretation only allows the County of Dane to control the quantity and concentration of such institutions. In short, petitioner is asking that the Court declare all approval of site and conditional use ordinances unconstitutional on the basis that its zoning committee does not have the good sense to exercise sound discretion in the best interests of the zoned area.

Petitioner's assumption that Browndale Homes were validly licensed as a foster home by the Department has no basis in fact. Neither Browndale International, nor Involvement Centers were ever licensed as a foster home. Some of their employees were licensed to operate a foster home as foster parents. (R. 306; I Ap. 131) John Vick, the Agency Licensing Supervisor for the Department, tes-

tified that a foster home license was not an appropriate license for this organization (Browndale or Involvement Centers) in terms of the kind of program that they proposed to operate. (R. 278, 306, 307) Therefore, any comparison of a Browndale home with a foster home is out of context as can be readily seen from a comparison of the above cited respective legal requirements and definitions enumerated on pages 5-8 herein.

The Dane County Ordinance, Sec. 10.26 (3) (a) (3), requires the Board of Adjustment to interpret the ordinance in the pubic interest and not contrary to its general intent.[4] The ordinance in question was created in 1938 many years before the concept of a Browndale home was ever imagined. It was its duty to determine, in the interest of the surrounding property owners, whether a Browndale institution for children, comprising of possibly 21 units in one concentrated area would have an adverse affect upon property values and normal use of the agricultural area, and to determine if the necessity of control, both from the point of view of quantity and location, was necessary in the best interest of the community. The amended ordinance adopted by the Dane County Board relative to institutions for children, specifically defining Browndale homes licensed under Chapter 48, Wis. Stats., as institutions for children, confirms the interpretation of the Board of Adjustment as being the general intent of the ordinance.

The Court should not substitute its judgment in interpreting an ordinance for the good judgment of the Board

---

[4]Sec. 10.26 (3) (a) (3) states: "In deciding appeals the board may sustain or reverse the decision of the zoning supervisor or make such modification or adjustment in the order as shall be in the public interest and result in substantial justice being done, but no such decision shall be contrary to the general intent of the ordinance."

of Adjustment. In *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926), p. 388, the Court said:

> "If the municipal Council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the Courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfactory to a majority of the citizens, their recourse is to the ballot—not the Courts."

Such is the care at bar and this appeal does not present to the Court a susbtantial Federal question, and the decision of the Wisconsin Supreme Court rests on adequate non-federal basis.

2. JUDICIAL QUESTION IS NOW MOOT

The Dane County Board has now amended the Dane County Ordinance and has defined "Institutions for children". This leaves moot the necessity of interpreting the ordinance for applicability to a Browndale home, subjected to zoning under the prior ordinance. This action concerns one Browndale home in the Town. No one objected to this one home. It could be permitted at this time as a conditional use under the new ordinance, without objection. Any additional Browndale homes applying for a conditional use permit would be controlled by the new ordinance and would not depend upon the decision in this case. Therefore, for practical purposes the appeal in this case is now moot. (In *Euclid*, Supra, p. 396, the Court said:

> "Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the Commissioners from giving it any effect whatever or against this company."
>
> . . .
>
> "Many questions may arise under it not necessary to be disposed of now, and we leave them for consideraiton when presented."

And at page 397, the Court said:

> "And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court, has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessity of the immediate issue. . . ."

The Wisconsin Supreme Court has not had the opportunity to rule on the validity of the new ordinance.

CONCLUSION

A Browndale home is an institution for children and it was not a violation of the 14th Amendment to refuse to classify it under the Dane County Ordinance as a single family residence. The issues are a proper discretionary subject for the exercise of police powers by zoning regulations. The judgment of the Wisconsin Supreme Court rests on a sound and adequate non-federal basis. The adoption of the new Dane County Ordinance defining "Institutions for Children" leaves the issue before the Court substantially moot.

This case is a zoning question only. No race, sex or minority group discrimination is involved. It is a question of the police powers of the state determining the best manner in which it can rehabilitate emotionally disturbed children with the least possible adverse affect upon the individual rights and property rights of others.

Respectfully submitted,

LLOYD A. SCHNEIDER
Counsel for Respondent,
Town of Cottage Grove